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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 575.

JOHN L. GILVARY,
Petitioner,

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

GLEN A. BOONE,
Attorney for Petitioner.

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
J. E. MATHEWS,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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STATEMENT.

Believing that the controlling question in this case relates to the basic conflict between the State and Federal system of remedies, it is deemed preferable to defer discussion of the facts and evidence to a later place in the brief.

Accordingly, the first question taken up will be the position of the respondent as to the dominant issue.

AS TO RESPONDENT'S CLAIM OF CONTRACT.*

1.

Throughout the respondent's brief the status of Gilvary is treated as that of an employe in intrastate commerce, in the strict and unmodified sense. The argument as made would be equally applicable if Gilvary had lost his arm in a repair shop while working on an intrastate

* This reply brief follows the index of respondent's brief with respect to numbering and lettering of paragraphs.

job and wholly removed from the operation of Federal legislation. The brief does not meet the question presented by the decisions cited by the petitioner, namely, *To what extent can a State control the rights of an employe of a railroad whose relationship to interstate commerce is sufficiently close to place him under the protection of Federal legislation.*

Avoiding repetition or restatement, the following statements of the respondent's position here are respectfully challenged as unsound.

(a) That the decision of the State Courts interpreting an Ohio contract drawn under an Ohio Statute is binding upon this Court. (pgs. 20-21 R. R. brief.)

This is untenable since the suit is based on a Federal Statute, the question is not local and this Court is not concluded by State decisions.

Judicial Code, Section 237;
Seaboard Ry. vs. Horton, 233 U. S. 492;
No. Car. Ry. vs. Zachary, 232 U. S. 253;
Kan. City Ry. vs. Jones, 241 U. S. 180;
Railway vs. Reny, 241 U. S. 288.

(b). That "it is fair to consider the benefits" acquired by the parties to the contract. (pg. 21 R. R. brief.)

This consideration is legislative and is entitled to no more weight than it received in the *Winfield* case. By the same principle the whole body of railroad workers could be brought within compensation laws. If railroads and other employers throughout the country are to be drawn into the local system of compensation with respect to Federal rights, it is evident that a vast problem is uncovered. No Court can know or determine upon which side lays the greater advantage to either of the involved groups. Far-

thermore, if a subject matter is Federal in nature the states are not empowered to enact supplementary legislation even though regarded as in furtherance of the paramount law.

See cases cited in petitioner's brief, pg. 17, *et seq.*

(c) That a release of liability "made beforehand" by a railroad employee is equally valid with a release of a claim already accrued. (R. R. brief, pg. 24.)

The brief cites no authority for this remarkable assertion. That railroads could bargain in advance with their workers for total or partial immunity from the consequences of violating Federal Safety Appliance laws is manifestly against public policy and contrary to the principle of *T. & P. Ry. vs. Rigsby*, 241 U. S. 33 and *Railroad vs. Schubert*, 224 U. S. 603.

(d) That the operation of the Ohio Statute and the steps taken by the company and Gilvary thereunder did not amount to "putting the parties to an election." (R. R. Brief, pg. 24.)

Counsel's argument here is the probable product of a natural anxiety to escape the rulings of this Court. Nothing in the brief serves to distinguish the operation of the Ohio Statute from those before the Court in the cases where this Court ruled upon the proposition. Whenever the State machinery is such as that the parties are invited, required or privileged to surrender a Federal status and in lieu thereof to submit themselves to the operation of then existing (and presumably all future) state laws the process of "putting to an election" has occurred. So long as only state rights or remedies are involved, there is no Federal question presented but if the choice must be made as between a State and a Federal status, the local law becomes an encroachment and an interference, not to be supported by beneficent purposes.

(c) That the "election of contract by Gilvary was not prohibited by Congress." (R. R. Brief, pg. 26.)

The brief notices that as to Federal Employers' liability any such attempted contract would be invalid under Section 5. This, of course, would include all Safety Appliance violations which happen to occur in interstate commerce. The argument is that the failure of Congress to prohibit contracts and devices in respect to Safety Appliance liability is to be construed as a permission to the States to take jurisdiction of the remaining phases of the subject matter.

The correct view indicated by the decisions of this Court is that no express prohibition is needed; that when Congress took over the control of interstate and intrastate rolling stock and prescribed its physical equipment there was no necessity for a specific prohibition to the states as to local legislation on that subject and that as matter of law all such local laws became immediately inoperative; that similarly there was no need for Congress to prohibit, by express enactment, any interference by the States with rights of action accruing to employees from violation of Safety Appliance regulations, since the mere exercise of the Congressional power excluded the States. Manifestly, the power in the States to amend, modify or substitute for the civil and penal liability fixed in or contemplated by the Federal Safety Appliance Act would, if tolerated, amount to a recognition of the power of the States to repeal such Federal Acts outright. It has already been seen (petitioner's brief, pg. 21) that when this Court denied the power of the States to interfere with the Federal Employers' Liability law by providing for workmen's compensation in cases of non-negligent injury to interstate employes such denial was grounded, not upon Section 5 of the Employers' Liability Act, but upon the principle just stated, that the paramount law excluded the local law.

THE ELEMENT OF VOLITION.

(R. R. Brief, pgs. 37 *et seq.*)

Respondent seeks to distinguish the instant case upon the ground of the "voluntary" or "express" agreement entered into by the parties. This argument, it is submitted, cannot be supported, upon the following grounds:

(1) In no respect does such voluntary contract, or the statute seeking to authorize it, or the state machinery set up to effectuate it, escape the interdict of this Court against legislative or executive action by the States which encroaches upon or interferes with a subject matter of Federal cognizance. The volitional nature of the contract does not cure the encroachment.

(2) Neither the contracting parties nor the State itself could endow a State executive body with jurisdiction to adjudicate rights created by a Federal Statute.

(3) There is no difference in substantive effect between an implied contract of employment arising from the volitional conduct (or inaction) of the parties and an express contract declaring the same result. A voluntary election under Compensation Laws is not any more or less conscious or intentional, in legal contemplation, whether it arises from a presumption of assent based upon conduct or silence, or whether it is expressed in a written instrument. In both cases the contract of employment includes the Statutes as part of the terms of employment. If from the nature of the subject matter an implied assent cannot be sustained (as in case of election between Federal and State rights) the essential nature of the case cannot be changed merely because the agreement is made express.

It has already been suggested in petitioner's principal brief that the essential status of the employe under Workmen's Compensation is contractual in character. This concept is subject to material qualification as shown below but to the extent that it is susceptible of adoption it presents no elements of novelty, being founded upon the meeting of the minds of the parties and arising from the adoption of the statute as a term of the contract of employment. This principle is shown by the following quotation from 28 *R. C. L.*, page 734, section 28:

"Formalities of Acceptance or Rejection. Notice.

Under many of the statutes both employers and employees are presumed to accept the provisions of the act unless some affirmative action on their part evidences an intention to the contrary, such action being usually the filing of certain papers with the proper state officials indicating a repudiation of the compensation principle. In other states, however, it appears that some positive act of the parties is essential to bring them within the operation of the statute. *The choice, it is said, is no less voluntary and optional under the acts requiring affirmative rejection than under the statutes prescribing a positive acceptance.* Under a statute providing that notice of an election by an employee not to accept its benefits must be made within a certain time, otherwise he will be deemed to have accepted it, it has been held that an employee who has been injured and has subsequently filed his election not to accept will be considered as within the provisions of the statute at the time of his injury and cannot bring an action at law therefor. * * * Some acts impute to the employee knowledge of the employer's acceptance of the law; others require actual notice, usually in the form of notices posted in the place of employment; and still others prescribe a statement in writing as part of the contract of hiring."

L. R. A. 1916A, 222; Ann. Cas. 1915C, 308; Ann. Cas. 1918B, 717.

L. R. A. 1916A, 221; Ann. Cas. 1915, 308; Ann. Cas. 1915C, 308.

The contractual character of the status of employees in such cases is well illustrated in a long line of cases involving extra-territoriality. A typical example is that of *Crane vs. Leonard, et al.*, 183 N. W., 204 (Michigan, 1921). 18 A. L. R. 285. It was held that under an optional Workmen's Compensation Act the relationship between master and servant is that of contract and as such would cover the case of injury beyond the state. The opinion reviews exhaustively the decisions of many Courts of last resort, especially those of New Jersey, Connecticut, Rhode Island, West Virginia and Minnesota. In *Gooding vs. Ott*, 77 W. Va., 487, cited by the Michigan Court, it was said:

> "But where as in New Jersey and in this State the Statute makes acceptance optional and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof binding the parties and enforcible in any jurisdiction the same as any other contract."

To the same effect,

Rounsaville vs. Central R. R., 87 N. J. L., 371;
Kennerson vs. Tow Boat Co., 89 Conn. 367;
Grinnell vs. Wilkinson, 39 R. I. 447;
Pierce vs. Bekins Co., 185 Iowa, 1346.

From these cases it will be apparent that from the inception of Workmen's Compensation in this country, the Courts have regarded the relationship of the parties as founded upon and necessarily embracing the familiar elements of contract. This has been true without regard to the variant forms of procedure imposed by the statutes of the different states. These elements were present in the Compensation Laws of New Jersey and New York, from which

jurisdictions arose the cases of *New York Central vs. Winfield*, 244 U. S. 147, and *Erie R. R. vs. Winfield*, 244 U. S. 170. It need not be repeated that in those cases the presence of the contractual factors was regarded by this Court as wholly impotent to set aside the Federal status of the parties and to substitute therefor the rights, remedies and status called for by the local contract.

Hence, recurring to the facts of the instant case, the legal status of Gilvary and his employer is equal to, but not greater than that of any other parties bound contractually whether expressly or impliedly by a system of compensation. The dignity of the status is not enhanced by an excess of formality and the resort to a writing, as in the instant case, effects no change of a fundamental nature since the writing in Ohio under the statute in question was merely evidence of what in other states was achieved in a less formal manner.

The case presents a further important question: Once a railroad and its employes submit themselves to the State authority as to rights, defenses, remedies and penalties, connected with Federal regulation (by Congress, Interstate Commerce Commission and all others) what are the continuing powers or jurisdiction of Congress and the States? Could Congress adopt a Workmen's Compensation Law of its own applicable to all workers injured by violation of Safety Laws? If so how would this affect employes who had already been assimilated into the State systems? Could the state remove the 50% penalty which Ohio now imposes where an injury is caused by a safety violation? Could a State repeal or greatly reduce the damages recoverable for wrongful death? If the Industrial Commission of the State of Ohio rejects a claim based on violation of Federal Statutes does the employe have a right Federal in nature or is the origin of his rights lost in his submission to the actuarial system of State insurance?

Does the Industrial Commission of Ohio in passing upon the legal question as to violation of a Federal Safety Appliance Statute remain bound by Federal Laws and decisions rendered or to be rendered by Federal Courts construing such statutes?

These questions indicate in part the problems that arise from the conflicting power of different legal agencies acting upon the same subject matter. They show the evil and confusion which arise from subjecting to State control an employee with Federal rights. This Court has disapproved the attempt of Congress to make available the State Workmen's Compensation systems for maritime workers. *Knickerbocker Ice Co. vs. Stewart*, 254 U. S. 149.

The obvious effort of respondent is to clothe the so-called election by Gilvary with the attributes of express contract and thereby to distinguish it from the types of election involved in *Employers' Liability Co. vs. Cook*, and *Erie R. R. Co. vs. Winfield*. This effort fails for at least two clear reasons:

(1) The Gilvary election lacks the elements of a true or express contract since the terms of it are left wholly subject to the changing provisions of the state law. That is to say, the amount of regimented benefit, the time of payment, the extent of penalty, rights of appeal and all other essential terms are and will continue to be what the statutory system prescribes. There is no fixity of terms or of right. Hence, the only effect of the signing of the paper in question by Gilvary was to subject him to the Workmen's Compensation Law of Ohio, as to subjects within the state's power. Thus viewed, his status is no more and no differently "contractual" in the express sense than that of any submitting employe under any form of election.

(2) The mere subscribing or written execution of a submission to the State law was present in *Employers' Liability Co. vs. Cook*, where The Ford Motor Co., as employer, had subjected itself by formal written declaration under Texas law. When the employe entered the Company's service the relationship became complete, with the original writing as the basis of the "contract." But this Court had no difficulty either with the element of express contract or with that of estoppel as now urged in the respondent's brief. *Employers' Liability Co. vs. Cook*, 281 U. S. 233.

It is repugnant to every essential characteristic of a true contract that the terms of it are wholly subject to change and modification by an external power.

The last two paragraphs are not to be taken as conceding that even if a true or express contract were made by an employer and employe they could translate themselves and their rights from a Federal to a State forum or from State to Federal. To adopt such view would entail a solution of the two fold problem elsewhere noted herein, that of jurisdiction and public policy.

THE CLAIM OF ESTOPPEL.

(R. R. Brief, pg. 43.)

The State Courts ruled against the respondent upon this issue. Since no Federal question is predicated upon the claim, it is difficult to see why this Court should be called upon to determine it. To begin with, the defense was not pleaded. Nor were there any facts introduced in evidence to show any conduct on Gilvary's part that misled the railroad. The respondent chose the language of the instrument on which it now relies. If that was legally insufficient to constitute a basis for considering Gilvary to be bound by the state act as to rights under the Federal law,

the responsibility for that situation rests upon the railroad. Where both parties have equal means of access to facts and law, each has an equal burden and neither can assert estoppel against the other. Especially where, as here, the rights of the parties grow out of or are determined by a legal document and involve complicated questions of law, the claim that one party has misled the other does not lie. Estoppels do not arise out of legal opinions or errors as to the law.

Commercial Investment Trust Co. vs. Bay City Bank, 62 F. 2 735;
Crary vs. Dye, 208 U. S. 515.

But there was nothing in the "contract" itself to lead the company to believe that it should pay premiums to the state based upon injuries which fell under Federal law, since by the proper interpretation of the statute (and of any election under it) the only subjects covered by Gilvary's waiver or submission were those "not forbidden by Acts of Congress" which as has elsewhere been shown, meant subjects not provided for by Acts of Congress.

This condition, as appears from the election itself, was not met. The company has therefore no basis in the contract itself to assert an estoppel. Nor did Gilvary by act or representation cause the company to believe that the election had a scope sufficient to cover the remedies given him by Congress.

Without extending the argument further, the authorities cited under the various divisions of the brief for petitioner negative any right or power in the railroad to attempt the "election" represented in the document which is the basis of its claim. The decision in *Booth Fisheries vs. Industrial Commission*, 271 U. S. 208, has no application since there was no attempt in that case to compel an election between a state and a Federal right. The

company there had deliberately made its choice as between two state remedies. The company was bound by its election just as the employee has been held bound by his election. The claim of counsel at page 49:

> "We see no difference between the position of Gilvary and that of the Booth Fisheries Company."

betrays a complete disregard of the decisions which we regard as controlling. If by the simple expedient of asserting an estoppel the parties could have been foreclosed against the assertion of their rights under Federal law, then many of the cases cited in petitioner's briefs on the subject of the supremacy of that law have been erroneously cited. Furthermore, the railroad received the full consideration for which it bargained. During Gilvary's period of employment it was protected by his submission as to his strict intra-state character.

Respondent is in the position of contending that parties may, by the reciprocal action of mutual estoppels, hurdle the dividing barriers of jurisdiction and redistribute governmental powers by their private controversy.

The statement in respondent's brief (pg. 43) that even if the Ohio statute be held invalid because of conflict with the Federal Act the parties would still be bound upon the theory of estoppel wholly ignores the grant of quasi-judicial power to a State administrative Board which would necessarily grow out of the asserted estoppel.

THE FACTS.

(R. R. Brief, pg. 3.)

It is admitted that the respondent is a common carrier by railroad engaged in both intrastate and interstate commerce; that petitioner was a switchman employee of said company and that at the time he was injured he was engaged in a coupling operation in the "east slab" yards of the railroad company.

In said yards there is a track known as the east track and after doing some switching on the running track and west track, in said yards, the yard crew (of which Gilvary was a member) moved over to the east track. This track runs north and south and it was the purpose of the particular movement to couple a cut of six moving cars to a standing Pittsburgh, McKeesport and Youghiogheny loaded hopper car. The cut of cars had the engine at its northerly end facing the north and backing southerly. The leading or most southerly car of said cut was a Baltimore and Ohio gondola car loaded with lumber and it was the purpose to couple the said moving gondola to the standing hopper car.

The knuckle of the standing hopper car was open; the knuckle of the moving car was closed (this is the usual, customary and proper way of coupling, one open knuckle being sufficient). (R. 46.) Gilvary was the rear brakeman in the crew and his work was to supervise the coupling to see that the coupling was "made." The conductor, Melvin, stood about two car lengths north of Gilvary, writing numbers; Skuce, the head brakeman, stood north of him, and the engineer, Cornell, was further north in his cab, all being on the same side or the east side with a difference of about 300 feet between Gilvary and the engineer.

When the cut of cars was set in motion and the leading B. & O. car came in contact, by impact, with the standing P. McK. & Y. car, the couplers failed to couple automatically and the knuckle on the standing car closed, the standing car being shoved backward about two or three feet toward the south, which car Gilvary immediately blocked. Gilvary then took hold of the lifting or cutting lever to open the knuckle. After some effort he got the knuckle open. (R. 48.) He then signalled the engineer to back again southerly in order to make the coupling. The cut of cars came back and again the couplers failed to couple by impact and again the knuckle on the stand-

ing car closed, said car being again shoved about two or three feet further south by the impact. Gilvary again attempted to open the knuckle by means of the operating lever but he could not open the same. He then tried to open it with his hand by going in between the ends of the cars but it would not open. He tried to open it with the lifting lever and with the lock pin. While between the cars he then decided to open the knuckle on the B. & O. gondola car. He could not use the lifting lever of this coupler as it was on the other side of the car. He also noticed that this coupler had been thrown or knocked out of alignment by the last impact and he knew that it would not couple in that position. It was six or eight inches out of line toward the west, the usual play of drawbars being a play of two to two and one-half inches. (R. 50.) After giving a signal to hold the cars, Gilvary went between the ends of the cars. He then tried to open the P. McK. & Y. coupler again with his hands, but same would not open. He then stepped over to the B. & O. gondola car, put his left arm about the coupler to put it back in line and as he was so engaged the cars came together and injured him.

The facts as testified to by Gilvary were particularly substantiated by the testimony of Skuce, the head brakeman. While the defendant attempted to show, through Melvin, the conductor, and Cornell, the engineer, that Gilvary was hurt in the first attempt at coupling, and only one signal was given by him, *Skuce*, testifying for the defendant *completely corroborated the testimony of Gilvary*, stating that Gilvary was hurt on the second attempt and that four signals were given, three of which came directly to him from Gilvary after the first attempt. (R. 141, 142, 143.) Skuce testified on this point as follows (R. 143):

> "Q. Was it on the first attempt or on the second attempt that he was hurt?
>
> A. Second."

If it were on the first attempt one signal would be the only signal that would be necessary. If four signals were given then it would substantiate the testimony of Skuce and Gilvary, that it was at least the second attempt that caused the injury.

To recapitulate, the testimony of Gilvary is corroborated as follows:

(a) The testimony by Skuce, on cross examination, who stated it was on the second attempt that Gilvary was injured, and that there were four signals, three direct from Gilvary. (R. 143.)

(b) The testimony of Keppers, the yardmaster, who, from the tests, testified that the knuckle was opened by means of lifting the lever and the use of one hand (R. 131, 132) and the farther testimony of Keppers that the cars were about on a straight track at the time of the accident. (R. 128.)

If the Court will read the testimony of Keppers and Skuce, but particularly the testimony of Skuce, (R. 133) it will find that the testimony of Gilvary was corroborated to an unusual degree.

CLAIMED ERROR AS TO QUANTUM OF PROOF.

(Respondent's Brief, pg. 48.)

Counsel introduce this branch of the argument by quoting a few questions and answers to show that Gilvary was unable to describe any defect in the coupler discoverable by ocular inspection alone. (Brief, pgs. 48-49.)

No one had claimed that the defect was cognizable by the mere sense of vision. What was claimed was that coupler would not work. The condensed statement of the testimony follows:

"as the cars came together, the knuckle closed and failed to couple. (R. p. 47.) I got hold of the cutting lever and I couldn't open it with one hand, so I got the two, shook it three or four times and it finally came open. I signalled the engineer to back up. They did not make. The same knuckle closed again. (R. p. 48.) I tried to open the coupler on the hopper car again. I was unable to open it with the lifting lever. I decided that I would try, go in between and open it so I swung the engineer down again. I got in and tried to open the standing car with the lever, with the lockpin, with my hand in between the cars, but I was unable to open the coupler (R. p. 49) and then decided I would line up the B. & O. car, but the drawbar was not in line. Was knocked out of line about six or eight inches. I got hold of the drawbar to pull it over. About the time I got the weight of my arms they backed up on me." (R. p. 50.)

Cross examination:

"Coupling didn't make. The knuckle on the 'Pee-Mickey' car closed. (R. p. 70.) I got hold of the cutting lever and finally opened it with my two hands. (R. p. 73.) I signalled to the engineer. The cars hit again and didn't make. (R. p. 74.) The knuckle closed. I couldn't get it open by the cutting lever. Went in between and gave it a couple of pulls. Couldn't get it open and decided to line up the B. & O. (R. p. 75.) Put my hand on the drawbar; just went to pull that over and the cars came back on me." (R. p. 76.)

These excerpts show a state of facts bearing a strong natural resemblance to those appearing in the coupler cases generally. The cases cited under a later caption, entitled "CLAIM AS TO PROXIMATE CAUSE" *infra*, will show that the circumstances of Gilvary's injury, the necessity of going between the cars, the repeated but ineffectual efforts to couple, the impact of the cars occurring while the employe was in the place and engaged in the act that the law seeks to guard against—all occurred in about the usual way

because the operation was the usual and customary one, as was apparently the defect. See especially the following cases:

San Antonio Ry. vs. Wagner, 241 U. S. 476;
Atchison T. & S. F. Ry. Co. vs. Keddy, 28 Fed. (2) 952;
P. & R. Ry. vs. Auchenbach, 16 Fed. (2) 550.

Respondent at page 49 is in effect asking this Court to review the finding of the jury upon the weight of the evidence by urging the effect of the "rigid inspection" after the accident, the "actual coupling" of the same cars, the "running tests" and the testimony of certain experts. As to each of these points (which respondent claims sufficient "not merely to equalize but to overcome" the admitted prima facie case of plaintiff below) there was not merely permissible but abundant ground for the action of the jury, of the trial court, of the Court of Appeals and of the Supreme Court of Ohio in rejecting the railroad's claims:

(a) The testimony of Keppers (Pg. 128) put the place of the accident at "just about at the curve" which of course also meant just about on the straight track and confirmed Gilvary, who said there was a slight curve. (Record pg. 58.)

(b) The "rigid" inspection was wholly ex parte. Neither Gilvary nor any impartial person was present. (R. pgs. 95, 120, 127, 144.)

(c) The "actual coupling" referred to was also strictly ex parte. But by the admissions of the railroad witnesses the couplers would not work without the men going between the cars. See testimony of Keppers, yardmaster, as to the tests made by the car inspector after the accident; Keppers testified as follows:

(R. pg. 131):

"Q. Did they open—the knuckles—open right up?

A. He pulled the lever and opened the knuckle and then closed it with his hand three or four times.

Q. Well, did he open it with his hands?

A. I don't believe he did. It isn't necessary.

Q. Was it necessary, that day?

A. I don't think so.

Q. I will ask you whether this question was asked of you, and this answer given by you at the last trial. 'Then what was done?' Answer: 'The car inspector opened and closed both knuckles.' Question: 'And how did he do that?' Answer: 'By pulling the lifting-lever with one hand and operating the knuckle with the other hand.' Did you so testify at the other trial?

A. Yes, sir.

Q. Is that the fact?

A. That is the way he was making his test, pulling it open with one hand and operating the knuckle with the other hand."

(R. pg. 132):

"Q. Well, didn't you say at the last trial: 'The car inspector opened and closed both knuckles.' 'How did he do that?' 'By pulling the lifting-lever with one hand and operating the knuckle with the other hand.' Isn't that correct?

A. Yes, sir."

(d) The testimony as to the inspection and tests shortly after the accident does not satisfactorily show that the cars were standing upon the curve in the same position as at the time of the accident. The testimony as to the "running tests" made upon another track on the succeeding day affirmatively shows that the conditions were not the same. (Record pgs. 127, 128, 144, 146, 148, 150.)

CLAIM AS TO PROXIMATE CAUSE.

(Respondent's Brief, pg. 51.)

(For the detail of evidence touching the question of proximate cause reference is made to caption "Error as to quantum of proof." B. 1, page 15 herein.)

Questioning the plaintiff below as to the "cause" of the accident, the attorney conducting the cross examination elicited the statement that after Gilvary had gone between the cars because of the failure of the couplers to work and while pulling one of the couplers into alignment the cars backed down and caught his arm between the draw-bars.

It seems remarkable that this classic and traditional form of railroad worker's injury—the typical casualty which occasioned the enactment of the Safety Appliance law—should again be challenged as a "condition," and that the original causation flowing from the defective couplers should be seriously regarded as broken by the movement of the cars. Since, however, the point is made, the authorities will be marshalled with none but the briefest comment. In many of them the inference of active, concurring negligence on the part of other employes is quite strong. The negligence of the company's engineer in the instant case is apparent but it concurred with the violation by the company with respect to the couplers. The cases more directly applicable are as follows:

Railway vs. Taylor, 210 U. S. 281;

Railway vs. Brown, 229 U. S. 317.

P. & R. Ry. vs. Auchenbach, 16 F. (2) 550 (C. C. A. 3). (Brakeman injured between cars due to backing movement caused by signal from flagman. Liability upheld on ground that defective couplers had required plaintiff to go between cars.)

Railroad vs. Goneau, 269 U. S. 405. (Brakeman repairing defective draw-bar on bridge, lost balance and fell.

Claim that the Safety Appliance defect was merely a "condition." Defect held proximate cause.)

Railway vs. Drake, 276 F. 393. (Brakeman after three attempts to couple went between the cars to fasten them with chains. Claim that primary causation had terminated since plaintiff was no longer between the cars to couple. Denied and verdict upheld.)

Railroad vs. Voelker, 129 Fed. 522, aff. 222 U. S. 222. (Holding that the acts of preparation for the coupling operation due to non-functioning of the mechanism are integral connected and indivisible parts of the operation of coupling and cannot be isolated from the impact itself.)

Donejan vs. Ry., 165 F. 869. (Brakeman between cars, because of defective coupler, stepped into unblocked frog. Held a question for the jury as to proximate cause.)

C. R. I. & P. Ry. vs. Ray, 168 Pac. 999 (Okla.) Cert. Den. 246 U. S. 662. (Holding that curve in track hindering effective coupling was no defense.)

Payne vs. Colvin, 276 Fed. 15 (C. C. A.). (Plaintiff in attempting to open knuckles, engineer failing to heed signals, plaintiff slipping on ice sustaining crushed foot, held within Act.)

Atchison & C. Ry. vs. Keddy, 28 F. (2) 952. Cert. Den. 279 U. S. 856 furnishes a clear answer to the immediate inquiry. There the plaintiff was engaged in a coupling operation and the engineer negligently backed the train against him. The railroad urged that the defective coupler was not the proximate cause of the accident. This contention was carefully examined by the Court of Appeals for the 9th Circuit and denied.

As elsewhere herein shown (page 24) the testimony of the experts as to the influence of the curve was not uncontradicted since one of them (Gensley, R. pg. 167) stated

that the couplers if in proper condition should have coupled upon a ten degree curve. Also Gilvary had testified (Record, pgs. 43 and 83) that he had for years seen cars couple automatically by impact at that same point on the track in question.

Whether the quantum of evidence in a case grounded upon the Safety Appliance Act is determined by State or Federal laws is of no moment since there was, within the controlling decisions of this Court, substantial testimony supporting plaintiff's petition, constituting admittedly a prima facie case and presenting a jury question.

N. Y. C. Ry. vs. Marcone, 284 U. S. 345;
G. N. Ry. vs. Donaldson, 246 U. S. 122.

P. Co. vs. Chamberlin, 288 U. S. 333.

Syllabus 2. Where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury without regard to the number of witnesses upon either side.

W. & A. Ry. vs. Hughes, 278 U. S. 497.

REFUSAL TO CHARGE.

(Respondent's Brief, pg. 53.)

Respondent makes a novel claim with respect to charges 6 and 7. It is thus stated in the language of counsel (pg. 54):

> "In the first place the Court refused after having given *part of the law* (Defendant's Request No. 6) *to complete the correct statement* by giving Defendant's Request No. 7."

It appears therefore that two requests were so linked together as that the giving of one would force the Court to give the other. Thus the separate charges were not complete, distinct and severable statements of the law and

both were in violation of Ohio law. The Court, however, gave No. 6. (Respondent's Brief, pg. 55.)

Again the brief avers:

> "To supplement instruction No. 6 and to define the terms implied in Instruction No. 6, the defendant requested 'Request No. 7.'"

For convenience of the Court we feel obliged to set forth both charges.

Instruction No. 6.

> "I say to you as a matter of law that the fact that these Baltimore & Ohio and P. McK. & Y. cars failed to couple does not necessarily establish that either or both of the couplers were defective, and you must consider all of the surrounding circumstances, including the curve or curves of the track, the grade thereof, the length of the cars and the fact that there is necessarily a permissible amount of side-play in the draw-bars. Hence, if you find that the failure of these two cars to couple was solely due to the curve, the grade of the track and the non-alignment of the draw-bars, due to a permissible side-play thereof, or that such failure was solely due to any, or any combination, of said causes, the plaintiff cannot recover here, and your verdict will be in favor of The Cuyahoga Valley Railway Company."

Instruction No. 7.

> "I instruct you that side-play in a coupler, according to a standard in general and accepted use on railroads, does not constitute a defect in the coupler, and unless you find by a greater weight of the evidence that there was in one or both of the couplers involved in this case greater side-play than was necessary to bring about, when properly operated and given a fair trial, the automatic coupling of the cars by impact, then I say to you, as a matter of law, that neither of these couplers can be found by you to be defective in that regard. Hence I say that if, by the

greater weight of the evidence, you shall find that a failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers, as I have just defined it to you, or either one of these conditions, your verdict will be in favor of the Cuyahoga Valley Railway Company."

The Assignment of Error, based on the rejection of No. 7, failed to gain the approval of the Ohio Courts. It is untenable for the following reasons:

(1) The first instruction (No. 6) was so comprehensive in its terms as to be erroneous in the latitude extended to the jury to allow collateral facts and circumstances to defeat the positive requirement of the Safety Appliance law. The jury were allowed, without rule or guidance, to consider (a) curve, (b) grade, (c) non-alignment of draw-bar due to *permissible* side-play, (d) length of cars, (e) *all the surrounding circumstances.* Under either system of law, either State or Federal, it cannot be allowable to supplement an illegal charge by an additional charge; especially one that is in itself improper. Not satisfied with this sweeping invitation to the jury to use their own views about the efficiency of the couplers in the light of factors some of which were scientific and technical and others which were or could be irrelevant, the railroad desired a partial repetition of instruction No. 6 by including in the Request (No. 7) a second ruling as *matter of law* that "if the failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers *as I have just defined it to you,* or either one of these conditions" your verdict shall be for the railroad.

The respondent was not entitled under Ohio law to two overlapping references to these exculpatory circumstances. The Court could not properly single out the special features of the railroad's defense and emphasize them.

Chesrown vs. Bexier, 101 O. S. 282;
Limbaugh vs. Ry., 94 O. S. 12;
Ozler vs. Ry., 109 O. S. 551;
American & C. Co. vs. Conkle, 86 O. S. 117;
General Code Ohio, Sec. 11447.

(2) The requested charge states the Court "had just defined" the permissible side-play. But the Court had not defined such side-play or fixed the limits of its permissive movement. That was an issue in the case and no two witnesses fixed the same limits. What was permissible depended upon all the factors as shown by the evidence. It depended particularly upon the extent of the curve at the point. If the curve were so slight as not to hinder the operation (as Gilvary testified, pg. 58) then the "permissible side-play" would be much less than at a more acute curve. There was a dispute in the evidence as to the extent of curve at the point of the accident. Hence the Court did not and could not define the "permissible side-play" as stated in Request No. 7. Also, it was improper to ask the Court to use the language "if you find the failure * * * was solely *due to a curve*" since the jury would naturally be misled into a belief that if the operation occurred *upon a curve of any degree* they would be allowed to return a verdict for the railroad although such curve were so slight as to be negligible. Indeed, the railroad's expert, Gensley, Trainmaster for the B. & O. Railroad, testified for the respondent as follows (pg. 167):

> "Q. Well, suppose they (the cars) are both properly lined up should they couple automatically by impact if one coupler is open? A. On a curve?
>
> Q. If they are properly lined up on a curve. A. Depends on the degree of curve and the impact.
>
> Q. A ten-degree curve, and an impact and the (draw-bars) properly lined up and the couplers open, should they couple if both couplers are in proper shape? A. Yes they should couple."

(3) The latter part of Request No. 7 is stated in the disjunctive, thus:

> "if you shall find that a failure of these two cars to couple was solely due to a curve of the track *and* the permissible side-plays of couplers *or* either one of these conditions" your verdict will be for the railroad.

This allowed the jury to exculpate the railroad for a failure due to curve alone (of undefined degree) or to coupler side-play alone (limits not fixed) irrespective of extent of curve.

We find no authority which allows segregation of these elements. It may be that this Court has furnished some warrant for a defense based upon their joint effect, but neither curves alone, nor side-play alone constitute a defense to the absolute duty imposed by the Act and it would be improper so to charge a jury.

C. R. I. & P. Ry. vs. Brown, 229 U. S. 317;
Ry. vs. Taylor, 210 U. S. 281;
Hohenleiter vs. So. Pac. Ry., 177 F. 796.

(4) The request assumed that there had been a general and accepted standard among railroads which as matter of law was binding. This was erroneous. *Roberts Interstate Carriers*, Section 809, citing many cases.

The objections to the general charge (Respondent's brief, pg. 56) are untenable under the various decisions of this Court in similar or analogous cases cited elsewhere herein. The complaint at page 57 however is so far from the facts that it deserves special notice. It is said by counsel that

> "In effect he (meaning the Court) instructed the jury that the failure of the coupler to operate was conclusive evidence of its defective or inadequate or insufficient condition" etc.

A reading of the quoted part of the general charge at page 56 (Record, pgs. 191, 192) where the Court again authorized the jury to consider the general circumstances, grade, curve, practical operation of a railroad, etc., will show that the objection should not come from the respondent. The error was wholly in its favor. See as to form of charge, *Wheeling & C. Ry. vs. Russell*, 209 F. R. 795, (C. C. A.).

The claim as to misconduct of counsel (Respondent's Brief, page 57) is based upon a reading by counsel for plaintiff below of certain language from a lawbook. Upon motion, the Court admonished the jury as follows (Record, pg. 186):

> "The Court will instruct the jury that the argument of counsel on either side is not evidence in the case now or at any time. Later the Court will instruct you as to the law."

The assertion of respondent's counsel (pg. 57) that "there was no instruction by the Court to disregard the argument made" and that the argument "had the implied approval of the Court" is not sustained by the Record. The point is controlled, so far as this practice is concerned, by *Timberman vs. State*, 107 O. S. 261, and *Montanari vs. Haworth*, 108 O. S. 8.

Respectfully submitted,

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